IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1977

No. 76-1111

RONALD OWENS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois made and entered in the above cause on November 15, 1976.

REFERENCE TO REPORT OF OPINIONS BELOW

The Supreme Court of the State of Illinois filed an opinion on November 15, 1976, attached hereto as Appendix A, which is reported at 2 Ill.Dec. 298, 357 N.E.2d 465 (1976).

JURISDICTION

The judgment of the Supreme Court of the State of Illinois was made and entered on November 15, 1976. On December 9, 1976, a mandate was issued by the Supreme Court of the State of Illinois directed to the Circuit Court of Cook County, Illinois affirming the judgment of the trial court. Jurisdiction of this court is invoked under Title 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Was the State Supreme Court correct in ruling that no substantial constitutional issue exists when a witness subsequent to trial claims that his trial testimony was false and that he was coerced into testifying falsely by police officers?

2. Was the defendant denied due process of law when his in-court identification by the sole eyewitness to a murder was the product of suggestive pre-trial photographic and line-up identification procedures and by comment of the arresting police officers to the witness which suggested that the defendant was the offender?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Post Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, § 122-1, 122-2):

> 122—1. § 122—1. Petition in the Trial Court.) Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit.
>
> 122—2. § 122—2. Contents of Petition.) The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

Fourteenth Amendment, United States Constitution:

> ". . . (N)or shall any State deprive any person of . . . liberty, . . . without due process of law. . . ."

STATEMENT OF THE CASE

The petitioner, Ronald Owens, was convicted by a jury for the offense of murder. He was sentenced to fourteen to twenty years in the penitentiary.

On December 23, 1969, at approximately 6:30 p.m., two brothers, Curtis and Robert Butler, left their home to cash their mother's payroll check at a nearby grocery store. It was beginning to get dark (A. 2, 8; R. 11, 31).*

Immediately after leaving the store, 5 youths approached the Butler brothers and mingled with them as they walked to the corner. One youth pulled a gun. Another youth hit Curtis Butler and told the youth with the weapon to shoot Butler. Two shots were fired striking Curtis Butler. He died from his wounds (A. 4, 5; R. 17-22). Robert Butler testified that the whole incident happened so fast he couldn't think (A. 11; R. 47).

a) IDENTIFICATION

Within two hours, the police, having driven Robert Butler through the neighborhood looking for the offenders, showed Butler a picture of the petitioner, Ronald Owens (A. 12, 13; R. 49-52):

> "Q. Now, did you identify the defendant from any pictures that you saw?
>
> A. The Ronald Owens they showed me and picture of Ronald Owens that when I looked at him now; then I wasn't sure.
>
> Q. Then you weren't sure?
>
> A. When I looked at the pictures, they were earlier pictures. It didn't look like him to me, and I

* "A"—Refers to page in abstract of trial record.
R—Refers to trial record.
Supp. Rec.—Record of post conviction proceedings.

> told them that I would have to see the boy that I visually identified. I would have to see him. Then they called me down on Christmas Day, and I went down to identify.

Two days later the police took Robert Butler from his home to the police station for a show-up. The police told Butler that they had Ronald Owens and two other boys in a room and Butler was to pick out Owens whose picture he had seen two days earlier (A. 14; R. 53):

> "A. Yes Sir, I stepped in front of the door, and I looked in the room for about a minute. And it was rather difficult because Ronald Owens had curlers in his hair. He had the hair slicked down, you know, like he had a duck, and he had curlers in his hair. And they were all wearing similar clothes.
>
> Q. They were all wearing similar clothes?
>
> A. Not exactly like, but they were all kind of dressed up."

Butler looked at Owens for a full minute, left the doorway, and returned a few moments later and identified the defendant as the youth who hit his brother Curtis and told the youth with the gun to shoot Curtis (A. 16, 17; R. 56-58).

b) FALSE TESTIMONY

Ranson Brown testified at trial that on the evening of the shooting at approximately 6:30 p.m. he saw the petitioner and four or five other youths walking south as they passed his laundromat in the immediate vicinity of the shooting. Eight to eleven minutes later the boys ran north past his store. He didn't hear any shots nor see the shooting but was informed later in the evening that someone had been shot. (A. 20-25; R. 78-98).

His testimony was used by the prosecution to corroborate the identification testimony of Robert Butler and

rebut the defendant's seven alibi witnesses all of whom placed the defendant elsewhere at the time of the shooting.

c) POST-CONVICTION PETITION

Petitioner's trial concluded in early April, 1971. In September, 1973, Ranson Brown signed a statement in which he recanted his trial testimony and in October, 1973 a petition for post-conviction relief was filed before the trial judge alleging *inter alia*, that Ranson Brown had been forced by the police to testify falsely at trial and that contrary to his trial testimony on December 23, 1969, he had *not seen* petitioner in the presence of other youths at 6:30 p.m. in the vicinity of the murder (Supp. Rec. 4-16, 25-32).

The post-conviction petition further alleged the denial of due process as a result of the suggestive pre-trial identification procedures which were not tested at trial because of counsel's failure to file a motion to suppress (Supp. Rec. 12-20).

The trial court dismissed the petition without a hearing. The direct appeal of the jury verdict and the post-conviction appeal were consolidated by the Illinois Supreme Court. The Court ruled that the petitioner's allegations of the use of false testimony by the prosecution did not assert a substantial denial of constitutional rights.

REASONS FOR GRANTING WRIT

I.

THE PETITIONER WAS CONVICTED ON THE BASIS OF PERJURED TESTIMONY.

Ranson Brown's testimony at trial rebutted the defendant's alibi witnesses and corroborated the sole eyewitness to the shooting.

The Illinois Supreme Court incorrectly stated that Brown's subsequent recantation did not support the conclusion that he lied at trial or that he was coerced by the police to testify falsely.

However, Brown's written statement in support of petitioner's post-conviction petition clearly stated:

1. That he did not see petitioner at the time (6:00-6:30 p.m.) and place of the killing as he had testified at trial; (Supp. Rec. 29, 32)

2. He was handcuffed by police and forced to appear in court after he told the police he didn't know what happened at the time of the shooting;

3. He testified falsely because of the police action (Supp. Rec. 31-32; See State's Brief pp. 22, 23, Appendix B).

A. THE ILLINOIS SUPREME COURT HELD THAT THE ALLEGATION OF PERJURED TESTIMONY FAILED TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

In Illinois, an allegation in a post-conviction petition alleging the use of perjured testimony at trial is sufficient to raise a substantial constitutional question. *People v. Sims*, 4 Ill.App.3d 878, 282 N.E.2d 16 (1972);

People v. Martin, 46 Ill.2d 565, 264 N.E.2d 147 (1970). Morecver, Illinois acknowledges that false testimony results in a denial of due process where the falsity occurs in testimony that goes to the credibility of a witness regardless of the materiality of the testimony. The test to be applied is whether:

> "the false testimony used by the State in securing the conviction of the petitioner may have had an effect on the outcome of the trial." *Napue v. Illinois*, 360 U.S. 264 (1959)

Inexplicably, the court ignored these basic principles and held simply that the pleadings of the post-conviction petition merely suggest that Ranson Brown "modified" the truth at petitioner's trial. However, the trial court refused to grant a hearing on petitioner's allegations and the Supreme Court affirmed. The court had before it the admissions of Ranson Brown but chose to grant the state's motion to dismiss, in effect ruling that the petitioner had not raised a constitutional question. No hearing was held to determine the credibility of Ranson Brown; (*i.e.*, whether the court believed his allegation that he testified falsely at trial).

B. THE STATE FAILED TO PROVIDE CORRECTIVE JUDICIAL PROCESS FOR PETITIONER WHOSE CONVICTION BY A JURY WAS BASED UPON FALSE TESTIMONY.

Long ago this Court said in *Mooney v. Holohan*, 294 U.S. 103, that the requirement of due process in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. But, "if it be urged that the concept thus formulated but condemns convictions obtained by the State through testimony known by the prosecuting officers to have been perjured, then the

answer must be that the delineated requirement of due process in the *Mooney* case embraces no more than the facts of that case require, and that the fundamental conceptions of justice which lie at the base of our civil and political institutions must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the State in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired." *Jones v. Kentucky*, 97 F. 2d 335 (1938)

The principle enunciated in *Jones* is the principle we seek here. We seek relief because a conviction has been secured on the false testimony of a state witness, whether the State knew or did not know at the time that the testimony was false.

It is immaterial to the petitioner whether the State knew or did not know at the time of trial that the testimony was false. It is enough that they know now.

The principle derived from *Mooney v. Holohan*, 294 U.S. 103, was that a state must provide a proper corrective judicial process where a conviction was secured on the basis of false testimony. Illinois has not provided such a corrective process in the case at bar.

By refusing a hearing to determine the credibility of the allegations in the petition, they held that an allegation of perjured testimony at trial does not raise a constitutional question; a ruling contrary to decisions of this court and prior decisions of the Illinois Supreme Court. The statement in its opinion (Appendix A) that the allegations in the petition do not support a suggestion of perjured testimony are clearly erroneous (See State's Brief, Appendix B).

Due process requires, at the least, that once the charge has been made and supported by the statements of a recanting witness, a constitutional question has been raised which requires a hearing to determine the truth or falsity of those charges.

II.

PETITIONER WAS DENIED DUE PROCESS BY THE USE OF SUGGESTIVE IDENTIFICATION PROCEDURES.

The sole eyewitness to the shooting of Curtis Butler was his brother, Robert Butler. His testimony was derived from identification procedures that were unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301, 302; *Neil v. Biggers*, 409 U.S. 188, 194.

The police showed Robert Butler pictures of petitioner Owens. He wasn't sure if Owens was one of the offenders (A. 12, 13; R. 49-52). He told the police "It didn't look like him to me. . . ." Two days later the police took Butler to the police station. Before arriving they told them they had Owens, whose picture they had previously shown him, in a room with two other youths. All Butler had to do was pick him out. Butler was taken to the doorway of the room and the following occurred:

> "A. Yes, sir, I stepped in front of the door, and I looked in the room for about a minute. And it was rather difficult because Ronald Owens had curlers in his hair. He had the hair slicked down, you know, like he had a duck, and he had curlers in his hair. And they were all wearing similar clothes."

Butler left the doorway with the police officers. He returned shortly and identified Owens as one of the offenders.

The identifications of Owens by Butler were "all but inevitable" under the circumstances. *Foster v. California*, 394 U.S. 440, 443 (1969).

The level of certainty displayed by Butler in his identification is shallow. He had been prompted prior to arriving at the station and was yet unsure of himself. He was unsure of the photographic display in spite of its suggestiveness. Butler was the sole eyewitness. His in-court identification under these circumstances was a denial of due process.

CONCLUSION

Petitioner Owens was identified at trial by a witness who had been prompted by suggestive identification procedures. The eyewitness was corroborated by a witness who subsequently admitted he lied at trial.

Petitioner prays that this court will consider his case to be of sufficient constitutional magnitude to warrant the granting of certiorari.

Respectfully submitted,

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APPENDIX A

357 N.E.2d 465

The PEOPLE of the State of Illinois, Appellee,

v.

Ronald OWENS, Appellant.

No. 44893.

Supreme Court of Illinois.

Nov. 15, 1976.

Defendant was convicted in the Circuit Court, Cook County, Alfonse F. Wells, J., of murder, and he appealed. While the appeal was pending, defendant filed a postconviction petition and the Supreme Court ordered the appeal proceedings stayed pending the adjudication of the postconviction petition. The Circuit Court thereafter dismissed the petition without a hearing and defendant appealed. The Supreme Court, Goldenhersh, J., held that evidence was sufficient to establish defendant's guilt beyond a reasonable doubt; that black and white photographs depicting the murder victim's wounds were properly admitted; that comments by the trial court in ruling on an objection and in admonishing defense counsel were not prejudicial to defendant or demeaning to defense counsel; that it was, under the circumstances, harmless error for the trial court to sustain an objection to a proper question propounded by defense counsel; that defendant was not denied the effective assistance of counsel; that general allegations that police fabricated the murder charge to retaliate against defendant did not assert such a substantial denial of con-

stitutional rights as is required for postconviction relief; and that defendant had not been entitled to a preliminary hearing.

Judgments affirmed.

1. Homicide 234(1)

Evidence which included positive identification by eyewitness to fatal shooting and testimony in contravention of defendant's alibi record was sufficient to support murder conviction.

2. Criminal Law 438(6)

Where three black and white photographs depicting wounds suffered by murder victim were used by pathologist to explain the wounds, photographs were relevant to prove facts in issue and were properly admitted, in murder prosecution, despite contention that photographs were without probative value and could only serve to inflame jury's emotions.

3. Criminal Law 656(3)

Trial court's remark, in sustaining State's objection to defense counsel reading prosecution witness' grand jury testimony to jury, that "There is nothing in the questions and answers, counsel, that can be construed as impeaching" was neither a prejudicial comment on the evidence nor demeaning to defense counsel.

4. Criminal Law 1166.22(3)

No prejudicial error resulted, in murder prosecution, from fact that trial court admonished defense counsel not to badger a prosecution witness and added that "Counsel knows how to ask a question, and that is not a proper question and not the right tone of voice."

5. Criminal Law 1170½(1)

Though it was error for trial court, in murder prosecution, to sustain State's objection to proper question propounded by defense counsel which would have laid foundation for reading as impeachment a portion of a grand jury transcript, where enough of transcript was read to jury to adequately apprise jury of omission in witness' grand jury testimony, error was harmless.

6. Criminal Law 641.13(2, 5)

Where, inter alia, it was not clear what evidence might have been adduced at hearing on motion to suppress which was not presented at trial and where defendant did not argue, except in abstract terms, grounds on which he contended identification should have been suppressed, neither defense counsel's failure to file motion to suppress nor fact that defense counsel tendered instructions which were at most harmless error was sufficient to establish that defendant was denied effective assistance of counsel.

7. Criminal Law 998(15)

General allegation, in postconviction petition, that police officers fabricated charge of murder against defendant in retaliation for defendant's having testified against police officer who was charged with murder was not sufficient to support conclusional allegation that State adduced testimony known to be false or to support assertion that prosecution witness' testimony was in fact false and petition therefore failed to assert substantial denial of constitutional right required for postconviction relief. S.H.A. ch. 38, § 122-1 et seq.

8. Criminal Law 224

Prior to effective date of Constitution of 1970, there was no constitutional right to a preliminary hearing.

R. Eugene Pincham and Theodore M. Becker, of Becker & Tenenbaum, Chicago, for appellant.

William J. Scott, Atty. Gen., Springfield, and Bernard Carey, State's Atty., Chicago (James B. Zagel, Asst. Atty. Gen., Laurence J. Bolon, David A. Novoselsky, and Bertina E. Lampkin, Asst. State's Attys., of counsel), for the People.

GOLDENHERSH, Justice:

A jury in the circuit court of Cook County found defendant, Ronald Owens, guilty of the murder of Curtis Butler. The circuit court denied post-trial motions for a new trial and arrest of judgment and sentenced defendant to the penitentiary for not less than 14 nor more than 20 years. Charging error of constitutional dimension, defendant appealed directly to this court (Ill.Const.1870, art. VI, sec. 5). While the appeal was pending defendant filed, in the circuit court, a petition under the provisions of the Post-Conviction Hearing Act (Ill.Rev.Stat., ch. 38, par. 122-1 *et seq.*). This court ordered that proceedings in the appeal be stayed pending the adjudication of the post-conviction petition and that in the event post-conviction relief was denied, the appeal, if any, be consolidated with the original appeal. The circuit court, upon allowance of the People's motion, dismissed the post-conviction petition without a hearing and defendant appealed.

[1] We consider first the issues raised in the original appeal and specifically defendant's contention that the evidence failed to prove him guilty beyond a reasonable doubt.

Robert Butler, brother of the deceased, Curtis Butler, testified that at approximately 6:30 p.m. on December 23, 1969, he and Curtis went to a grocery store in the

vicinity of Marquette Road and Ashland Avenue in Chicago to cash their mother's paycheck. The store was crowded, and Robert waited outside while Curtis went into the store. As he stood outside the store, Robert observed a group of "about five guys" approaching from the north, along Ashland. They arrived in front of the store at approximately the same time Curtis came out, and the Butlers walked south toward the corner with the group of young men. Curtis stopped to light a cigarette and Robert walked a short distance ahead of him. When he noticed that Curtis was not with him he turned back toward him. He heard one of the members of the group ask Curtis "Is it a game?" and Curtis responded that it was a game. The youth who had asked the question then pulled out a gun and said "Keep walking." He repeated the command several times, but Curtis refused to move. Defendant, who was standing closest to Curtis then said "Get your ass going." Curtis turned toward defendant, and defendant struck him in the face with his right fist. Robert heard defendant say to the boy who had drawn the gun, "Shoot him, shoot him, shoot that nigger." Two shots were fired. Curtis grabbed his shoulder and ran past Robert. Robert was dazed for a "couple of seconds," and when he realized what had occurred everyone seemed to have disappeared. He ran after Curtis, who had run about a block from the scene of the shooting and had fallen in the snow. Apparently he died at the point at which he collapsed and fell.

Ranson Brown, called by the People, testified that he worked at a laundromat at 6649 South Ashland. On December 23, 1969, he had closed the laundromat between 6:30 and 7 p.m. and was standing by the front window using the telephone when he saw defendant and five or six other boys walk past the laundromat in a southerly direction. Approximately "eight or eleven

minutes" after he had seen the group of boys, he saw the defendant, who was "crippled and limping," running north at a slow pace. He testified that he had known defendant by his nickname "Trey" for five or six years because he frequently came into the laundromat with his mother when she did her washing. He was interviewed by police officers investigating the case that same night.

Robert Butler testified that his attention had been drawn to defendant when he first saw the group of boys because he was the tallest among them. At one time during the occurrence he had stood within four feet of defendant. The shooting took place in a well-lighted business district, and the snow on the ground reflected the light. He testified that defendant was wearing a light-colored coat, probably beige. The day after the shooting he identified defendant from a photograph. Although the testimony shows that defendant was born with only two fingers on his right hand (the three missing fingers being the basis for the nickname "Trey"), was clubfooted, and had had polio as a child, Butler, in his description of defendant, made no mention of any noticeable distinguishing features except his height. Butler testified that the police came to his mother's house on Christmas Day and asked him to come to the police station because "they were going to have a lineup of some guys and they told me that the man I described as Robert [*sic*] Owens would be there." He stated that he viewed a three-man lineup at the station and picked out the defendant twice, once with glasses, and again after having him remove them. Butler acknowledged that the boy whom he identified as defendant had not worn glasses at the time of the shooting. He denied having identified anyone else at the lineup. The record shows that the "lineup" to which Butler referred was not the

usual lineup but consisted of his viewing defendant and two other boys in a room at the police station.

Defendant testified that Sergeant Bisek, a Chicago police officer, stopped at his father's home and left a phone number for him to call. He called Bisek, who told him that there "was a misunderstanding that he wanted to get straightened out." Defendant, accompanied by his brothers, Alfred Elmore and Gregory Jones, went to the police station, where Sergeant Bisek told him that he had bad news for him and "We got a warrant on you for murder." Defendant denied any participation in the occurrence and requested that he be given an opportunity to be viewed by any witnesses to the shooting. Defendant testified further that approximately one half hour later Robert Butler was brought into the room where he, Alfred Elmore, and Gregory Jones were seated. Butler pointed at Gregory Jones. A police officer took Butler from the room, and upon his return Butler pointed at defendant. Alfred Elmore's testimony corroborated that of defendant. At the time of trial Gregory Jones was in the United States Marine Corps stationed at San Diego and did not testify.

Defendant presented an alibi defense. He testified that in the early afternoon of December 23, 1969, he and his two stepsisters, Kathleen and Patricia Jacobs, had picked up defendant's girl friend, Sylvia Gant, and had bought groceries for his step-mother. On the way back to his father's home defendant's car became stuck in the snow. The four of them returned to his father's home at approximately 3 or 3:30 p.m. From that time until 7 p.m. they watched the movie "King of Kings" on television. Sometime during that period he had called an acquaintance, Emmett Ousley, on the telephone, and upon Ousley's arrival at his father's home, he and Ousley had

stood in an outside hallway and discussed several matters, including the possibility of retrieving defendant's car. After watching "King of Kings" defendant played cards with his family and Sylvia Gant, and later watched another television movie.

Defendant testified that he had left his father's house only three other times that day. At some time between 7 and 9 p.m. he went to a neighbor's house to see if he could find a way to take Miss Gant home, since his car remained stuck in the snow. That visit took "five or six minutes." At about 9 p.m. defendant and Miss Gant went to a nearby store to buy snack food. They returned to defendant's father's apartment and remained there for approximately an hour or two. The last trip of the day was to take Sylvia Gant home. Having been unsuccessful at getting his car free or securing someone else's aid, defendant and Miss Gant attempted to find a taxi. While trying to find a taxicab they came to the laundromat where Brown was employed. Although Brown was reluctant, defendant persuaded him to let them in to use the telephone to call a taxi and, while Sylvia called, he spoke with Brown. At that time Brown told him that someone had told him (Brown) that there had been a shooting.

Defendant also testified that he had club feet, had been a polio victim as a small child and because of his deformity was unable to make a fist with his right hand. He walked with a limp and was unable to run well.

Defendant's father and stepmother, Ernest and Flora Mae Jones, Mrs. Jones' daughters, Kathleen and Patricia Jacobs, and Sylvia Gant testified concerning defendant's trip to pick up Miss Gant and to buy groceries, as well as his presence at his father's apartment during the afternoon and evening. They testified that they too had

watched "King of Kings" until 7 p.m. Emmett Ousley testified that following a call from defendant he had gone to defendant's father's apartment and that he had engaged in conversation with defendant in the hallway outside the apartment. Sylvia Gant's account of the trip home, including the conversation with Ranson Brown, was substantially as defendant related it.

In rebuttal, the People called the office manager of WLS TV, Channel 7, who testified that according to official logs, prepared by her, the showing of "King of Kings" ended at 5 p.m. and that there was no movie shown on Channel 7 between 5 and 7:30 p.m. on December 23, 1969. Nick Crescenzo, a Chicago police officer assigned to investigate the homicide of Curtis Butler, testified that he had gone to the home of Ernest Jones, defendant's father, at 8:30 p.m. on December 23, 1969, and was told by Ernest Jones that defendant was not there and that "he hadn't seen him that night." Joseph Barrett, a Chicago detective, testified that he saw Ernest Jones at his home at approximately 9:30 a.m. on December 24, 1969. He stated that "I told Mr. Jones I was looking for Ronald Owens, and he stated that he didn't know where he was at. He stated he hadn't seen him all evening and possibly we could locate him at his place of employment."

We find apposite here our statement in *People v. McDonald*, 62 Ill.2d 448, 456, 343 N.E.2d 489, 493, that "it is the function of the jury to pass upon a question of an accused's guilt, and we will not reverse a conviction unless the evidence is so improbable as to justify a reasonable doubt of the accused's guilt. (*People v. Stringer*, 52 Ill.2d 564, 568, 289 N.E.2d 631; *People v. Peto*, 38 Ill.2d 45, 49, 230 N.E.2d 236.) We cannot say the evidence in the record before us raises a reasonable doubt of the defendant's guilt."

[2] Defendant contends next that certain of the circuit court's rulings were erroneous and so prejudicial as to require reversal and remandment for a new trial. He contends that the circuit court erred in admitting into evidence three black and white photographs which depicted the wounds suffered by the deceased. He argues that because a "life and death" witness testified to the fact of death, and a pathologist testified to the cause of death, the photographs were without probative value and could serve only to arouse and inflame the emotions of the jury. The photographs were used by the pathologist to explain the wounds suffered by the deceased, were clearly relevant to prove facts in issue and the circuit court did not err in admitting them. *People v. Henenberg*, 55 Ill.2d 5, 302 N.E.2d 27.

[3, 4] Defendant contends next that two comments made by the circuit court, one in the course of ruling on an objection during defendant's cross-examination of Robert Butler, and the other while admonishing defense counsel during cross-examination of Ranson Brown, demeaned defense counsel in the eyes of the jury, to defendant's prejudice. While cross-examining Butler defense counsel sought to read to the jury Butler's testimony before the grand jury. This was done in an attempt to show that Butler had not testified that defendant had told the boy with the gun to shoot the deceased. The People objected and the court, in ruling on the objection, said:

> "The Court: Objection is sustained. There is nothing in the questions and answers, counsel, that can be construed as impeaching.
> I will sustain the objection."

Defendant contends that the ruling was error, and that even more prejudicial than the erroneous ruling on the evidence was the court's comment on the evidence.

During the cross-examination of Ranson Brown the court, in admonishing defense counsel, said:

> "The Court: First of all, there is no need for you to shout at the witness. And there is no need for you to badger the witness. Counsel knows how to ask a question, and that is not a proper question and not the right tone of voice."

From our examination of the record we conclude that in the context in which they were made neither comment was prejudicial to defendant or demeaning to defense counsel.

[5] Concerning the question whether the circuit court erred, when during Butler's cross-examination it refused to permit defense counsel to read his grand jury testimony to the jury, we note that the parties are in agreement that Robert Butler did not, before the grand jury, testify that defendant told the person holding the gun to shoot the deceased. The rule applicable to impeachment by proof of failure to state a fact on a prior occasion was stated in *People v. Henry*, 47 Ill.2d 312, 320-21, 265 N.E.2d 876, 882:

> "It would appear that no prior inconsistent statement in the usual sense was involved, but inconsistency in the literal sense is not always required for impeachment. In *Carroll v. Krause*, 295 Ill. App.552, 15 N.E.2d 323, the witness testified that an auto in which the plaintiff was riding had but one headlight. At an earlier inquest the witness omitted mention of the fact of a single headlight. It was held that the prior statement was admissible for impeachment purposes, though the witness had not been asked specifically about the auto's headlights at the inquest. The court said at page 562, 15 N.E.2d at page 328: 'The rule is that the omission of a witness to state a particular fact under circumstances rendering it incumbent upon him to, or likely that he would, state such fact, if

> true, may be shown to discredit his testimony as to such fact. 70 C.J. 1061; Greenleaf on Evidence (16th Ed.) Vol. I, sec. 462a.' Where, as here, it is claimed there has been a material omission of matters contained in a prior statement from later testimony it is logical that the fact of such omission should be admissible. Wigmore says: 'A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the nonexistence of the fact.' (Wigmore on Evidence, (3rd ed. 1940), sec. 1042); see also, McCormick on Evidence (1st ed. 1954), sec. 34; *Erickson v. Erickson and Co.*, 212 Minn. 119, 2 N.W.2d 824.) It would have been natural for the witness to have told her in her testimony of the claimed coercion."

The circuit court did not err in refusing to permit defense counsel to read further from the transcript at the time when he attempted to do so. It did, however, err in sustaining an objection to a proper question propounded by defense counsel which would have laid the foundation for reading as impeachment the portion of the transcript to which defendant refers. The record, however, shows that enough of the transcript was read to the jury so that it was adequately apprised of the omission during Butler's prior testimony and we hold that the error was harmless.

Contentions similar to those made concerning Butler's testimony before the grand jury are also made in defendant's brief in connection with a narrative statement apparently made by Butler to a police officer and introduced at the coroner's inquest. The statement is not in the record and we do not consider the arguments relevant to it.

[6] Defendant contends next that by reason of trial counsel's incompetence he was denied the effective assistance of counsel. He argues that counsel's in-

competence is demonstrated by his failure to file a motion to suppress Butler's testimony and "to contest the identification." We do not perceive, nor does defendant suggest, what evidence might have been adduced at a hearing on a motion to suppress which was not presented at trial, nor does defendant argue, except in abstract terms, the grounds on which he contends the identification should have been suppressed.

Further evidence of defense counsel's incompetence, argues defendant, is that he tendered, and the circuit court gave, two instructions, one concerning the alibi defense and another to the effect that defendant's testimony should not be disregarded because he was the defendant. In the context of the instructions in their entirety, assuming *arguendo* that the giving of these instructions was error, the error was harmless. Neither the failure to file a motion to suppress nor the tender of the instructions supports defendant's contention that he was denied the effective assistance of counsel. From our review of the entire record we conclude that defendant was competently and effectively represented. We find no error which would justify reversal and remandment for a new trial.

[7] We consider now the contentions concerning the petition filed under the Post-Conviction Hearing Act (Ill.Rev.Stat. 1975, ch. 38, par. 122-1 *et seq.*). Several of them are identical to the claims of trial error already discussed and need not be further considered. In defendant's petition it is alleged in general terms that the police officers at the Englewood district station fabricated the charge of murder against him in retaliation for his having testified against a police officer who was charged with murder. Defendant alleged in the petition that Chicago police officers:

"* * * went to Ranson Brown, and with force, violence, threats and while handcuffed, brought Ranson Brown to the trial, and en route to said trial said officers told Ranson Brown what he must testify to on the trial.

32. Said officers knew that what they told Ranson Brown to which he must testify was not true but was false, but said officers coerced Ranson Brown into so testifying falsely.

33. Ranson Brown's false testimony on Defendant-Petitioner's trial was that at or about 6:00 or 6:30 p.m. on December 23, 1969, he observed the Defendant-Petitioner in the company of four or five other fellows on Ashland Avenue, southbound towards 67th Street, and that a short time later he observed them running northbound from 67th Street."

Attached to the petition is the statement of Ranson Brown, taken by defendant's appellate counsel approximately 2½ years after the trial. The statement supports neither the conclusional allegation that the People adduced testimony known to the police to be false (see *People v. Martin*, 46 Ill.2d 565, 264 N.E.2d 147, 56 Ill.2d 322, 307 N.E.2d 388) nor the assertion that his testimony was in fact false. At most it would seek to modify some portions of his testimony. The petition and statement, considered together, fail to assert the substantial denial of constitutional rights required for post-conviction relief.

[8] In the post-conviction petition defendant also alleged that because he was denied a preliminary hearing he was deprived of a substantial constitutional right. The matters complained of occurred prior to the effective date of the Constitution of 1970 and there was then no constitutional right to a preliminary hearing. *People v. Hood*, 59 Ill.2d 315, 319 N.E.2d 802.

For the reasons stated the judgments are affirmed.

Judgments affirmed.

APPENDIX B

STATE'S BRIEF (Pp. 22-23)

Defendant's Post Conviction Petition

In defendant's post conviction petition defendant raised numerous alleged errors of constitutional dimension including an allegation that his trial counsel was incompetent, that the People knowingly used perjured testimony and fabricated the charge against the defendant, and that the police forced Ranson Brown, by the use of violence and threats, to testify falsely concerning the defendant's whereabouts on December 23, 1969, between 6:00 and 6:30 p.m. (Supp. R. 4-10) Appended to defendant's post conviction petition was a statement by Ransom Brown. (Supp. R. 25-34) In that statement Brown related that on December 23, 1969, between 6:00 and 7:00 p.m. the laundromat he operated was closed and that some plain clothes white police officers came to the door and knocked. Brown, who was in the back room, came up front and let the officers in. (Supp. R. 27-28) When he did they presented their badge and asked Brown if he knew Train. Brown knew the defendant as Tray but referred to him as Train. Brown said that he knew Train. (Supp. R. 27-28) He also said he told them that he had seen Train "today" but that he couldn't see Train that night because his door was shut. (Supp. R. 29) Brown alleged in his statement he had seen Train between 3:30 and 4:00 that evening. When asked if he saw the defendant about 6:00 or 6:30 running past his place with some other boys Brown responded, "well, they had some boys, but I didn't see—really didn't actually Train, definitely, I couldn't see looking from the

back, with the door closed. With the door closed I couldn't see." (Supp. R. 29, 32) Brown said he did not see Tray about 6:30 that evening. (Supp. R. 29) Brown also said that after telling the police he knew Tray they left; the next time he saw them was when they came and handcuffed him and transported him to court. (Supp. R. 30) He said they handcuffed him because he wasn't aware of anything that had happened on the street. When asked why he had testified in court that he had seen the defendant Brown stated, "what—you going to do when they come and pick you up? (Supp. R. 31-32) After the People responded to the defendant's allegations the trial court denied defendant's petition. (Supp. R. 84) Defendant appeals both the verdict of guilty and the denial of his post conviction petition without a hearing. No issue is raised regarding the sufficiency of defendant's indictment.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1977

No. 76-1111

RONALD OWENS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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REASONS FOR DENYING THE WRIT

A.

THE STATE POST-CONVICTION PETITION WAS PROPERLY DISMISSED BECAUSE IT WAS INSUFFICIENT AS A MATTER OF STATE LAW.

An allegation of perjured testimony at trial is cognizable under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., 1975, Ch. 38, Sec. 122-1 *et seq.* if not

conclusory and if supported by affidavit. *People v. Martin*, 46 Ill.2d 565, 264 N.E.2d 147 (1970); *People v. Smith*, 42 Ill. 2d 516, 251 N.E. 2d 721 (1969).

In defendant's petition defendant alleged that police fabricated the charge against him and forced Ransom Brown to testify falsely concerning defendant's whereabouts on the night of the murder of the deceased in order to preclude the defendant from testifying at the murder trial of police officer Louis Pote. Defendant contends that the "substantial factual basis" for this allegation is the statement given by Ransom Brown incorporated in defendant's post conviction petition.

A review of the petition discloses, however, that defendant's allegations concerning the motivation for the police forcing Ransom Brown to perjure himself are conclusory and based upon mere conjecture. There is nothing in the record or in defendant's post conviction petition from which one could reasonably infer that the police were attempting to preclude defendant from testifying at Louis Pote's murder trial.

In the present case, in order for the trial court to accept Brown's attempted recantation as true he would have to believe that the police officers told Ransom Brown exactly what to say (Brown never made that allegation) and he would also have to accept defendant's unsupported allegation of the police officers' motivation for forcing Brown to perjure himself.

Even assuming arguendo that the trial testimony of Brown was perjured defendant still was not denied a constitutional right to a fair trial because the allegedly perjured testimony was not necessary for defendant's conviction. In view of the positive, reliable identification of the defendant by Robert Butler who had more than an adequate opportunity to view his brother's assailant

any error in the admission of Brown's circumstantial testimony was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). This fact alone distinguishes *Napue v. Illinois* 360 U.S. 264 (1959). See, *United States ex rel. Dale v. Williams*, 459 F.2d 763 (3rd Cir. 1972).

B.

IDENTIFICATION PROCEDURES WERE NOT UNDULY SUGGESTIVE AND THERE EXISTED AN INDEPENDENT BASIS FOR THE IN-COURT IDENTIFICATION.

Robert Butler, brother of the deceased, testified that on the night of his brother's murder the police showed him some photographs, one of which was of the defendant. When he looked at the picture of the defendant he wasn't sure if defendant was the assailant because it was an earlier picture of the defendant so he told the police he would have to visually see his brother's assailant in order to identify him. (R. 50-51) Two days later the police called Robert and transported him to the police station to view a lineup. They told him that he was going to see a lineup and that the person he described as the defendant, Ronald Owens, would be in the lineup and that Robert would be able to tell if he still felt the same way about his identification. (R. 23)

Robert was told that the police were conducting a three man lineup and that he was to look into the room and see if he could identify anyone. (R. 53) Robert passed by the door and looked in. There were three men standing, practically all the same height and dressed similarly. Defendant also had curlers in his hair and was wearing tinted glasses. Robert identified the defendant then asked the police to have the defendant remove his glasses because Robert didn't want anyone to feel

that he had made up his mind without seeing the defendant without the glasses. Robert then pointed defendant out a second time as his brother's assailant. (R. 56-58) Although both the defendant and his brother, Alfred, testified that Robert initially identified defendant's other brother, Gregory, Robert denied ever identifying anyone other than the defendant. (R. 55, 125, 211)

The record shows that the defendant was viewed, along with his two brothers who were dressed very similarly to the defendant and who were both about the defendant's height, in a lineup conducted just 2 days after the offense when the witness' recollection of the events was greatest and where his memory as to the identity of the assailant was fresh. This was at a time when the danger of susceptibility to suggestion should have been at its lowest level. Indeed, when the witness observed the defendant, defendant was wearing tinted glasses and had rollers in his hair, yet, the witness was still able to identify the defendant and his identification was certain and unequivocal.

It should also be pointed out that even though Robert Butler was told that "the man [he] described as Ronald Owens would be there—," this action on the part of the police was not unnecessarily suggestive. It is evident to any person who comes to view a lineup that the police think they have the offender in custody. Furthermore, Robert had already told the police he would have to see the defendant visually to determine if he was his brother's assailant.

Even assuming that the lineup was unduly suggestive there was an independent basis for the in-court identification of the defendant. *Stoval v. Denno*, 388 U.S. 293 (1967).

The record discloses that Robert Butler first saw the defendant coming down the street toward him with a group of other youths and that Robert particularly noticed the defendant because the defendant was the tallest in the group. (R. 15, 36-37). The scene of the murder was depicted by Robert thusly: they were all near the corner of 67th and Ashland, a busy street with many lights and two way traffic; additionally, there was a great deal of lighting coming from the grocery store adjacent to the well-lit drug store on the corner where the shooting took place. (R. 23-24). The closest Robert got to the defendant was 4 feet and he was looking at the defendant's face at that time. (R. 24). When they reached the corner the deceased was standing between Robert and the defendant, when the defendant, lunging at the deceased, told the deceased to "get [his] ass going". As the deceased turned toward the defendant the defendant struck him in the face and then said, "[Shoot] him. [S]hoot him. [S]hoot that nigger." (R. 18-20, 44, 46). The boy with the gun shot the deceased and everyone ran. (R. 20-21). Considering all these circumstances together, particularly the lighting conditions and the opportunity the witness had to observe the defendant, the close and frightening contact with the defendant that the witness experienced and the unequivocal identification of the defendant at trial, there is not room for doubt that the identification of the defendant had as its origin the time of the offense uninfluenced by the lineup confrontation so that there is no merit to defendant's contention that he was denied due process of law. Therefore, the error, if any, in the admission of testimony concerning defendant's lineup identification was harmless beyond a reasonable doubt and could not have affected the jury's verdict. *Chapman v. California*, 386 U.S. 18 (1967).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted,

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